

DEFENSE TALK

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CURRENT EVENTS, ARTICLES, AND SUMMARIES OF RECENT CASES AND LEGISLATION IN THE
AREAS OF WORKERS' COMPENSATION, LIABILITY, INSURANCE, AND EMPLOYMENT LAW

Industrial Claim Appeals Office Update

The cases summarized here are only a selection of the cases decided by the Industrial Claim Appeals Office. In these summaries ALJ=administrative law judge; AWW=average weekly wage; ICAO=Industrial Claim Appeals Office; PTD=permanent total disability; TTD=temporary total disability.

AWW

ICAO affirmed ALJ Krumreich's order granting respondents' motion for summary judgment. Claimant contended that his AWW should be increased by the cost of continuing health insurance under employer's group plan. Respondents argued that claimant's health insurance benefits had not vested at the time of the injury, because he had not worked for the em-

ployer long enough to be eligible to apply for health insurance through the employer. ICAO agreed with the ALJ's conclusion that non-vested benefits should not be included in computing AWW. *Conklin v. Core-Mark International*, W.C. No. 4-828-815 (ICAO Aug. 18, 2011)

Compensability

ICAO affirmed ALJ Friend's order finding claimant's injury compensable. Although the ALJ rejected claimant's explanations that she fell because she was avoiding another employee in a narrow hallway with obstructions and found that the carpet where claimant fell had no tears or ruffles, he determined that claimant's fall was not unexplained. Unexplained falls are not compensable. ICAO held that the ALJ's finding that claimant's trip and fall "was likely caused by the want of ordinary care on the part of Claimant" was sufficient to support an award of benefits, even though there was no evidence of what caused her to trip and fall. ICAO noted that claimant was hurrying when she tripped and fell. *Schaffhauser v. National Jewish Medical Center*, W.C. No. 4-815-335 (ICAO Aug. 29, 2011)

PTD

ICAO affirmed ALJ Mottram's order that denied and dismissed the claim for PTD benefits. ICAO held that it was claimant's burden to prove that he is incapable of earning any wages in the same or other employment. Even if respondents produced no evidence of specific jobs that were

available to claimant, the ALJ would not be compelled to determine that claimant was entitled to PTD benefits. *Lockyer v. May's Concrete, Inc.*, W.C. No. 4-623-424 (ICAO Aug. 15, 2011)

TTD After Reopening

ICAO affirmed ALJ Cannici's order denying respondents' request to terminate TTD benefits. ICAO held that the burden was on claimant, who had been found responsible for the termination of her employment, to establish a worsening of condition and consequent wage loss. However, claimant does not have to prove an actual wage loss. Claimant can prove entitlement to additional TTD benefits by showing that increased restrictions caused a greater impact on her temporary work capacity. *Garcia v. Frontier Airlines*, W.C. No. 4-677-511 (ICAO Aug. 17, 2011)

The orders summarized here are on file with the editor. If you would like a copy of any order, contact Diane Murley at dmurley@cmb-pc.com or 970-255-8852.

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Practice Pointer

Overcoming a DIME

By Richard A. Bovarnick

A Division IME (DIME) physician's opinions on maximum medical improvement and permanent medical impairment are given presumptive effect and are binding unless overcome by clear and convincing evidence. It is not enough to present evidence showing a difference of opinion between physicians; the evidence must show that it is highly probable the DIME physician's opinion is incorrect.

One approach to challenging a DIME physician's impairment rating is to present evidence that the rating does not follow the revised third edition of the American Medical Association *Guides to the Evaluation of Permanent Impairment*. The Colorado Workers' Compensation Act requires that impairment ratings be based on the AMA Guides. If a party can demonstrate that the DIME physician did not follow the AMA Guides, the ALJ may be persuaded

that it is highly probable the DIME physician's opinion is incorrect. Although the AMA Guides can be submitted as exhibits at a hearing or deposition, it is more persuasive to have an independent expert testify and explain how the DIME physician's opinions deviated from the AMA Guides.

A DIME physician's opinions may also be challenged for failure to follow the medical treatment guidelines and impairment rating guidelines adopted by the Director of the Division of Workers' Compensation as part of the Workers' Compensation Rules of Procedure. The Division also publishes Impairment Rating Tips for use by physicians. Although a DIME physician is not required to apply the impairment rating tips, the tips may be relevant to the DIME physician's impairment rating, and the physician's application of those tips goes to the weight the ALJ will give to an impair-

ment rating. As with the AMA Guides discussed above, a DIME physician's rating can be challenged by submitting copies of the relevant guidelines and tips and by presenting expert testimony explaining how the DIME physician failed to follow the guidelines and tips.

Although a DIME physician's opinions on maximum medical improvement and permanent medical impairment are given presumptive effect, they can be overcome by clear and convincing evidence. Using the AMA Guides and publications of the Division of Workers' Compensation are just some of the ways DIME opinions have been successfully challenged.

If you have any questions about overcoming a DIME, please contact any of the attorneys at Clifton, Mueller, & Bovarnick, P.C.

VICTORIES IN THE TRENCHES

Richard A. Bovarnick

In *Brixius vs. Quikrete Companies, Inc.*, ALJ Jones denied and dismissed claimant's claim for workers' compensation benefits. Rich submitted employer and medical records, presented the testimony of an employer representative, and cross-examined the ATP to persuade the ALJ that claimant had failed to prove he suffered an injury or occupational disease to his left upper extremity in the course and scope of his employment.

In *Directo vs. School District 11*, ALJ Stuber ordered that employer was entitled to take a 50% offset against indemnity benefits. Rich presented testimony of employer witnesses about the employer's requirement that bus drivers wear traction devices over their shoes during snowy or icy weather and cross-examined claimant about claimant's removal of the required traction devices. The ALJ was persuaded that claimant's admitted injury resulted from his willful failure to obey a reasonable safety rule of the employer.

In *Adame vs. SSC Berthoud Operating Co.*, ALJ Cain determined that claimant had reached MMI and awarded her no PPD benefits for her 2009 low back injury. The DIME physician found claimant was not at MMI and opined that, if she was at MMI, she sustained a 24% whole person impairment rating. ALJ Cain agreed with Rich that it was highly probable and free from serious doubt that the DIME physician erred on both counts.

John M. Abraham

In *Quintana vs. Walmart Stores, Inc.*, ALJ Cannici denied and dismissed claimant's request for Workers' Compensation benefits for an alleged occupational disease to her left wrist. John presented the testimony of an employer witness about claimant's job duties and the testimony of an occupational medicine specialist about the DWC medical treatment guidelines for diagnosing carpal tunnel syndrome (CTS). The specialist explained that claimant's job duties did not meet the requisite amount of force required to establish causation of CTS under the guidelines. He also noted

that claimant had non-occupational risk factors for CTS and that she continued experiencing pain after she stopped working for employer. The ALJ was persuaded that claimant failed to prove she sustained an occupational disease during the course and scope of her employment with employer.

In *Farias vs. Walmart Stores, Inc.*, ALJ Cannici denied and dismissed claimant's request for workers' compensation benefits. John presented testimony of claimant's supervisor about her job duties, the evaluator who conducted an ergonomic assessment of claimant's job site, and an occupational medicine physician who performed a medical records review. The job-site evaluator testified that she did not observe any primary or secondary risk factors in claimant's job duties. The physician testified that keyboarding is not a significant risk factor for the development of CTS and that claimant's job duties did not satisfy the criteria of repetition and force for at least six hours required by the Medi-

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IPSI DIXIT



Tony and Yvonne were 85 years old and had been married for sixty years. Although not young, they were both in very good health, largely due to Yvonne's insistence on healthy foods and exercise for the last decade. One day, their good health didn't help when they went on yet another holiday vacation and their plane crashed, sending them off to Heaven.

They reached the pearly gates, and St. Peter escorted them inside. He took them to a beautiful mansion, furnished in gold and fine silks, with a fully stocked kitchen and a waterfall in the master bath. A maid could be seen hanging their favorite clothes in the closet. They gasped in astonishment when he said, "Welcome to Heaven. This will be your home now."

Tony asked Peter how much all this was going to cost. "Why, nothing," Peter replied. "Remember, this is your reward in Heaven."

Tony looked out the window and right there he saw a championship golf course, finer and more beautiful than any ever built on Earth.

"What are the greens fees?" grumbled Tony.

"This is heaven," St. Peter replied. "You can play for free, every day."

Next they went to the clubhouse and saw the lavish buffet lunch.

"Don't even ask," said St. Peter to Tony. This is Heaven, it is all free for you to enjoy."

Tony looked around and asked, "Well, where are the low-fat and low-cholesterol foods and the decaffeinated tea?"

"That's the best part," St. Peter replied. "You can eat and drink as much as you like and you will never get fat or sick. This is Heaven!"

"No gym to work out at?" said Tony.

"Not unless you want to," was the answer.

"No testing my blood pressure or sugar or"

"Never again."

Tony glared at Yvonne and said, "You and your bran flakes. We could have been here ten years ago!"

This month's *ipsi dixit* was submitted by an anonymous reader. Send your suggestions for "Ipsi Dixit" to the editor at dmurley@cmb-pc.com.

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In the Courts

Court of Appeals Update Personal Injury— Settlement—Spouse's Claims

In *Draper v. DiFrenchi-Gordineer*, announced September 1, 2011, the Colorado



Court of Appeals held that an agreement settling an injured person's personal injury claims, which was signed by both wife and husband, does not necessarily bar the spouse's claims for loss of consortium and negligent infliction of emotional distress. The court pointed out that the settlement agreement referred only to the wife's claims and concluded that the husband's signature indicated that he would no longer be able to pursue his wife's claims because of their relationship. The settlement agreement did not expressly release defendants from liability for the husband's claims of loss of consortium and negligent infliction of emotional distress. The court held that those claims were separate from the wife's claims and were not barred by the wife's settlement of her claims.

Note: Summaries and articles should not be relied upon as authority for a particular case. Consult any of the attorneys at Clifton, Mueller & Bovarnick, P.C. for advice on the application of all the law to the specific facts of your case or legal problem.

VICTORIES IN THE TRENCHES

Continued from page 2

cal Treatment Guidelines. The ALJ was persuaded that claimant's CTS was not caused, accelerated, intensified, or aggravated by her job duties.

Holly M. Barrett

In *Wood vs. Wal Mart*, ALJ Henk denied and dismissed claimant's claim for conversion of his left knee permanent impairment to a working unit, his request for payment for a lumbar MRI, and his request for PTD benefits. Holly presented reports and testimony of respondents' IME physician, the DIME physician, an occupational medicine expert, and a vocational expert. She persuaded the ALJ that claimant had failed to prove his left knee injury was not on the schedule, that the MRI was reasonably necessary or related to his work injury, or that he was unable to earn any wages as a result of the work injury. The ALJ specifically found that claimant's current complaints and disability were not related to his work injury.

In *Martinez vs. Wal-Mart Stores, Inc.*, ALJ Stuber denied and dismissed claim-

ant's claim for compensation and benefits for her bilateral carpal tunnel syndrome. Holly presented records of claimant's previous medical treatment, employment records, and the report and testimony of an expert in physical medicine and rehabilitation who had performed an IME. The expert testified that claimant had several risk factors for CTS, but that her job duties did not involve any of the risk factors recognized in the medical literature. The ALJ concluded that claimant failed to prove that she suffered an occupational disease resulting directly from the employment or conditions under which work was performed and following as a natural incident of the work.

In *Georgopulos vs. Family Dollar Stores of Colorado*, ALJ Broniak denied claimant's claim for additional TTD and PPD benefits. Holly presented medical records and other documents to persuade the ALJ that respondents had appropriately calculated and paid TTD and PPD benefits, and that claimant had failed to establish that the DIME physician erred by not providing an impairment rating for Claimant's shoulder.

The ALJ also granted Holly's motion to strike claimant's petition to review.

M. Frances McCracken

In *Gold vs. Walmart*, ALJ Stuber denied and dismissed claimant's claim for compensation and benefits. Fran presented medical records of treatment of claimant's injury and pre-existing conditions, a surveillance video of the event in which claimant sustained his injury, claimant's recorded statement, and the testimony of employer witnesses. The ALJ determined that claimant had failed to prove that he suffered an accidental injury arising out of and in the course of his employment.

In *Gizaw vs. Wal Mart Stores, Inc.*, ALJ Felter denied and dismissed claimant's claims for penalties. The adjuster had filed an FAL including the statement "all benefits not admitted are denied." Fran persuaded the ALJ that the claim for penalties was closed. Although the claimant timely objected to the FAL and filed an AH, the issue of penalties was not endorsed on the AH filed within 30 days of the FAL.



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